



(Billing Code 5001-06)

DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 223 and 252

RIN 0750-AI07

**Defense Federal Acquisition Regulation Supplement: Storage,
Treatment, and Disposal of Toxic or Hazardous Materials—
Statutory Update (DFARS Case 2013-D013)**

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Proposed rule.

SUMMARY: DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to conform with statute, amend the clause prescriptions, and update the basic and alternate clause for the prohibition on storage, treatment, and disposal of toxic or hazardous materials.

DATES: Comment Date: Comments on the proposed rule should be submitted in writing to the address shown below on or before [Insert date 60 days after date of publication in the **FEDERAL REGISTER**], to be considered in the formation of a final rule.

ADDRESSES: Submit comments identified by DFARS Case 2013-D013, using any of the following methods:

- o Regulations.gov: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by entering "DFARS

Case 2013-D013" under the heading "Enter keyword or ID" and selecting "Search." Select the link "Submit a Comment" that corresponds with "DFARS Case 2013-D013." Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "DFARS Case 2013-D013" on your attached document.

- o E-mail: dfars@mail.mil. Include DFARS Case 2013-D013 in the subject line of the message.
- o Fax: 571-372-6094.
- o Mail: Defense Acquisition Regulations System, Attn: Ms. Susan Williams, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT: Ms. Susan Williams, Defense Acquisition Regulations System, OUSD(AT&L)DPAP/DARS, Room 3B855, 3060 Defense Pentagon, Washington, DC 20301-3060. Telephone 571-372-6092; facsimile 571-372-6101.

SUPPLEMENTARY INFORMATION:

I. Background

DoD is proposing to amend DFARS subpart 223.71, currently titled "Storage and Disposal of Toxic and Hazardous Materials," to conform subpart 223.71 to 10 U.S.C. 2692. Additionally, the contract clause at 252.223.7006 is being reformatted to facilitate the use of automated contract writing systems.

As part of DoD's retrospective analysis, a review of DFARS part 223 was conducted for the purpose of streamlining the regulations. It was determined that additional clarification to DFARS 223 is needed to assure compliance with existing standards under 10 U.S.C. 2692, entitled Storage, Treatment, and Disposal of Nondefense Toxic and Hazardous Materials. Originally, DAR case 92-D361 was opened in 1993 to address the requirements of the Defense Authorization Act for Fiscal Year 1993 (Pub. L. 102-484), which modified 10 U.S.C. 2692. An interim rule, DAR case 92-D361, was published in the Federal Register on May 13, 1993, (58 FR 28458) to implement the requirements of 10 U.S.C. 2692 and DoD Directive 6050.8. Prior to the interim rule, no coverage existed in the DFARS. However, DoD Directive 6050.8, Storage and disposal of non-DOD owned hazardous or toxic materials on DoD installations, had been previously issued on February 27, 1986, to cover the requirements of 10 U.S.C 2692. Over the years a number of amendments to the statute have been issued. DoD Directive 6050.8 was cancelled on September 10, 1998, as having served its purpose. Accordingly, this rule

proposes to amend DFARS 223.71 to better align the DFARS to the current provisions set forth in 10 U.S.C. 2692 by—

- Revising text to reflect current language and restrictions contained within the statute;
- Reorganizing and partially rewriting sections to provide greater clarity to contracting officers;
- Adding a new clause prescription under 223.7104; and
- Revising the basic clause and alternate to require flowdown of the clause to subcontractors.

A. Discussion.

This rule proposes to make the following changes:

- Revise the 223.71 heading by adding the word "treatment" and changing "toxic and hazardous" to "toxic or hazardous". The revised heading is "Storage, Treatment, and Disposal of Toxic or Hazardous Materials".
- Add a new section 223.7101, Definitions, to include the terms "storage" and "toxic or hazardous materials" and provide a cross reference to clause 252.223-7006, "Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials," where the terms are defined. The remaining sections in subpart 223.71 are renumbered as a result of adding the new section 223.7101, Definitions.

- Redesignate 223.7100, Policy, as section 223.7102, Policy.

The redesignated section 223.7102, paragraph (a) adds the term "treatment" to the 10 U.S.C. 2692 list of prohibited actions and includes a statement that the prohibition applies to toxic or hazardous materials "that are not owned either by DoD or by a member of the armed forces (or a dependent of the member) assigned to or provided military housing on the installation, unless an exception in 223.7104 applies." A new paragraph (b), implementing 10 U.S.C. 2692(c)(2), is added to state that when storage of toxic or hazardous materials is authorized based on imminent danger, the storage provided is required to be temporary and must cease once the imminent danger no longer exists. In all other cases, the storage or disposal is required to be terminated as determined by the Secretary.

- Redesignate 223.7101, Procedures, as section 223.7103, Procedures. The following changes are made to the redesignated section 223.7102. Paragraph (a) is redesignated as paragraph (b). The original paragraph (b) is redesignated as subparagraph (a)(2) and revised for purposes of clarity and to conform to 10 U.S.C. 2692(b)(11). A new subparagraph (a)(1) is added to clearly identify and direct the reader to the prohibition exceptions.

- Redesignate 223.7102, Exceptions, as section 223.7104, Exceptions. The following changes are made to the redesignated

section 223.7104. Subparagraphs (a)(1) through (a)(9) are redesignated as (a)(2) through (a)(10), new subparagraphs (a)(1) and (a)(11) are added to the list of exceptions, and newly redesignated subparagraphs (a)(3), (a)(9), and (a)(10) are revised. Paragraph (b) is revised to require an additional finding by the Secretary of Defense that storage or disposal would not compete with private enterprise (see 10 U.S.C. 2692(c)). The additions and revisions to the redesignated section 223.7104 are as discussed below.

Subparagraph (a)(1) adds an exemption to the prohibition for the storage, treatment, or disposal of materials used in connection with an activity of DoD or in connection with a service performed on a DoD installation for the benefit of DoD (see 10 U.S.C. 2692(b)(1)).

Subparagraph (a)(3) is revised to expand the exception for storage or disposal of explosives when no alternative exists to State or local law enforcement under the conditions set forth in the subparagraph (see 10 U.S.C. 2692(b)(3)).

Subparagraph (a)(9) is revised to remove the term "a private person" and expands the exception for the storage of toxic or hazardous materials not owned by DoD but is required or generated in connection with the authorized and compatible use of a facility of DoD, including the use of such a facility for

testing material or training personnel (see 10 U.S.C. 2692(b)(9)).

Subparagraph (a)(10) is revised to remove the term "non-DoD owned material" and replace it with "toxic or hazardous materials not owned by DoD", remove the term "by a private person," remove the language concerning commercial use of an industrial facility and replace it to reflect use of a facility of that military department when the Secretary enters into a contract or agreement with the prospective user, and replace the term "that person's" with "the prospective user's" (see 10 U.S.C. 2692(b)(10)).

Subparagraph (a)(11) adds an exemption for the storage of material not owned by DoD when the Secretary of the military department concerned determines the material is required or generated in connection with the use of a space launch facility on a DoD installation or other land controlled by the United States (see 10 U.S.C. 2692(b)(11)).

- A new section 223.7105, Reimbursement, is added to provide that the Secretary of Defense may assess a charge for any storage or disposal provided under the subpart. Any assessed costs shall be identified in the contract and are required to be paid to the Government on a reimbursable cost basis and (see 10 U.S.C. 2692(d)(1)).

- Redesignate 223.7103, Contract clause, as section 223.7106, Contract clause, and revise the clause title to read "Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials". The changes made to the redesignated section 223.7106 are discussed below.

Paragraph (a) revises the basic clause prescription by broadening the clause application to include solicitations and contracts that may require access to a DoD installation, unless a determination is made under 223.7104(a)(10). Offerors and contractors requiring access to a DoD installation will be put on notice of the prohibition of storing, treating, or disposing of non-DoD toxic or hazardous waste on a DoD installation.

Paragraph (b) is revised to reflect the revised title for the alternate clause and the redesignation of 223.7102(a)(9) as 223.7104(a)(10).

- The clause 252.223-7006 titled is revised to read "Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials." New clause preface paragraphs (a) and (b) are added to address use of the basic and alternate clauses. Additional changes are made to the basic and alternate clauses as discussed below:

The basic clause is expanded to include the treatment and reimbursement of costs to the Government. A requirement to flow down the substance of the basic clause is also added.

The alternate clause is modified to reflect the redesignation of 223.7102(a)(9) as 223.7104(a)(10). The flowdown provision is expanded to all subcontractors that may be permitted access to a DoD installation. The alternate clause also clarifies that the substance of the clause shall be flowed down to all subcontract tiers and that the prime Contractor is not relieved of liability by flowing the substance of the clause down to subcontractors.

B. Clause with an alternate.

In order to facilitate the use of automated contract writing systems, DoD is processing multiple cases, by DFARS part, to modify the naming convention for clauses with alternates, revise the clause prescriptions and clause prefaces, and provide the full text of each alternate in the regulation.

This rule proposes to revise the title of the basic clause and its alternate, consistent with the new naming convention for clauses with alternates. The title of the basic clause is revised to read "Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials-Basic." Likewise, the title of the alternate clause is revised to read "Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials-Alternate" in lieu of "Alternate I".

Providing the full text of the alternate clause in the regulation should make the clause clearer to DoD contracting officers and to offerors. The current convention for alternates

is to show in the regulation only the changed material that differs from the basic solicitation provision or clause. Providing the full text of the alternate in the regulation will clarify the paragraph substitutions.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, is subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq*, because the objective of the rule is to conform the DFARS with the statute regarding the storage, treatment, or disposal of toxic or hazardous materials not owned by DoD on DoD

installations and to facilitate the use of automated contract writing systems. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

The legal basis for the rule is 10 U.S.C. 2692, as amended. DoD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to conform to the statute and apply the new paradigm for clauses with alternates.

This rule affects contractors and subcontractors performing contracts that involve the storage, treatment, or disposal of toxic or hazardous materials not owned by DoD on a DoD installation. The Federal Procurement Data System does not provide identification of how many contractors and subcontractors (whether large or small) may be affected. Although the rule does provide more exceptions to the prohibition, as provided in 10 U.S.C. 2692, it also implements 10 U.S.C. 2692(d)(1), which provides that the Secretary of Defense may assess a charge for any storage or disposal provided under this section. Any such charge shall be on a reimbursable cost basis.

The rule does not duplicate, overlap, or conflict with any other Federal rules. No alternatives were determined that will accomplish the objectives of the rule.

DoD invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2013-D013), in correspondence.

V. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 223 and 252

Government procurement.

Manuel Quinones,

Editor, Defense Acquisition Regulations System.

Therefore, 48 CFR parts 223 and 252 are proposed to be amended as follows:

1. The authority citation for parts 223 and 252 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

**PART 223-ENVIRONMENT, ENERGY AND WATER EFFICIENCY, RENEWABLE
ENERGY TECHNOLOGIES, OCCUPATIONAL SAFETY, AND DRUG-FREE
WORKPLACE**

2. Revise subpart 223.71 to read as follows:

**Subpart 223.71 Storage, Treatment, and Disposal of Toxic or
Hazardous Materials**

Sec.

223.7101 Definitions.

223.7102 Policy.

223.7103 Procedures.

223.7104 Exceptions.

223.7105 Reimbursement.

223.7106 Contract clause.

**Subpart 223.71 Storage, Treatment, and Disposal of Toxic or
Hazardous Materials**

223.7101 Definitions.

As used in this subpart, the terms storage and toxic or hazardous materials are defined in the clause at 252.223-7006, Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials.

223.7102 Policy.

(a) 10 U.S.C. 2692 prohibits storage, treatment, or disposal on DoD installations of toxic or hazardous materials that are not owned either by DoD or by a member of the armed forces (or a

dependent of the member) assigned to or provided military housing on the installation, unless an exception in 223.7104 applies.

(b) When storage of toxic or hazardous materials is authorized based on an imminent danger, the storage provided shall be temporary and shall cease once the imminent danger no longer exists. In all other cases of storage or disposal, the storage or disposal shall be terminated as determined by the Secretary of Defense.

223.7103 Procedures.

(a)(1) Storage, treatment, or disposal of toxic or hazardous materials not owned by DoD on a DoD installation is prohibited unless—

(i) One or more of the exceptions set forth in 223.7104(a) is met including requisite approvals; or

(ii) Secretary of Defense authorization is obtained under the conditions set forth in 223.7104(b).

(2) When storage, treatment, or disposal of toxic or hazardous materials not owned by DoD is authorized in accordance with this subpart, the contract shall specify the types and quantities of toxic or hazardous materials that may be temporarily stored, treated, or disposed of in connection with the contract or as a result of the authorized use of a DoD facility or space launch facility. All solicitations and contracts shall specify the

conditions under which storage, treatment, or disposal is authorized.

(b) If the contracting officer is uncertain as to whether particular activities are prohibited or fall under one of the exceptions in 223.7104, the contracting officer should seek advice from the cognizant office of counsel.

223.7104 Exceptions.

(a) The prohibition of 10 U.S.C. 2692 does not apply to any of the following:

(1) The storage, treatment, or disposal of materials that will be or have been used in connection with an activity of DoD or in connection with a service to be performed on a DoD installation for the benefit of DoD.

(2) The storage of strategic and critical materials in the National Defense Stockpile under an agreement for such storage with the Administrator of General Services Administration.

(3) The temporary storage or disposal of explosives in order to protect the public or to assist agencies responsible for Federal, State, or local law enforcement in storing or disposing of explosives when no alternative solution is available, if such storage or disposal is made in accordance with an agreement between the Secretary of Defense and the head of the Federal, State, or local agency concerned.

(4) The temporary storage or disposal of explosives in order to provide emergency lifesaving assistance to civil authorities.

(5) The disposal of excess explosives produced under a DoD contract, if the head of the military department concerned determines, in each case, that an alternative feasible means of disposal is not available to the contractor, taking into consideration public safety, available resources of the contractor, and national defense production requirements.

(6) The temporary storage of nuclear materials or nonnuclear classified materials in accordance with an agreement with the Secretary of Energy.

(7) The storage of materials that constitute military resources intended to be used during peacetime civil emergencies in accordance with applicable DoD regulations.

(8) The temporary storage of materials of other Federal agencies in order to provide assistance and refuge for commercial carriers of such material during a transportation emergency.

(9) The storage of any material that is not owned by DoD, if the Secretary of the military department concerned determines that the material is required or generated in connection with the authorized and compatible use of a facility of DoD, including the use of such a facility for testing material or training personnel.

(10) The treatment and disposal of any toxic or hazardous materials not owned by DoD if the Secretary of the military

department concerned determines that the material is required or generated in connection with the authorized and compatible use of a facility of that military department and the Secretary enters into a contract or agreement with the prospective user that—

(i) Is consistent with the best interest of national defense and environmental security; and

(ii) Provides for the prospective user's continued financial and environmental responsibility and liability with regard to the material.

(11) The storage of any material that is not owned by DoD if the Secretary of the military department concerned determines that the material is required or generated in connection with the use of a space launch facility located on a DoD installation or on other land controlled by the United States.

(b) The Secretary of Defense may grant an exception~~s~~ to the prohibition in 10 U.S.C. 2692 when essential to protect the health and safety of the public from imminent danger if the Secretary otherwise determines the exception is essential and if the storage or disposal authorized does not compete with private enterprise.

223.7105 Reimbursement.

The Secretary of Defense may assess a charge for any storage or disposal provided under this subpart. If a charge is to be assessed, then such assessment shall be identified in the contract with payment to the Government on a reimbursable cost basis.

223.7106 Contract clause.

Use the basic or the alternate of the clause at 252.223-7006, Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials, in all solicitations and contracts which require, may require, or permit contractor access to a DoD installation.

(a) Use the clause Prohibition on Storage, Treatment, and Disposal of Toxic or Hazardous Materials-Basic, unless a determination is made under 223.7104(a)(10).

(b) Use the clause Prohibition on Storage, Treatment and Disposal of Toxic or Hazardous Materials-Alternate I, when the Secretary of the military department issues a determination under the exception at 223.7104(a)(10).

PART 252-SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Section 252.223-7006 is revised to read as follows:

252.223-7006 Prohibition on storage, treatment, and disposal of toxic or hazardous materials.

As prescribed in 223.7106, use the basic clause or its alternate:

Basic: As prescribed at 223.7106(a), use the following clause:

PROHIBITION ON STORAGE, TREATMENT, AND DISPOSAL OF TOXIC OR
HAZARDOUS MATERIALS-BASIC (DATE)

(a) Definitions. As used in this clause—

Storage means a non-transitory, semi-permanent or permanent holding, placement, or leaving of material. It does not include a temporary accumulation of a limited quantity of a material used in or a waste generated or resulting from authorized activities, such as servicing, maintenance, or repair of Department of Defense (DoD) items, equipment, or facilities.

Toxic or hazardous materials means:

(i) Materials referred to in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (42 U.S.C. 9601(14)) and materials designated under section 102 of CERCLA (42 U.S.C. 9602) (40 CFR Part 302);

(ii) Materials that are of an explosive, flammable, or pyrotechnic nature; or

(iii) Materials otherwise identified by the Secretary of Defense as specified in DoD regulations.

(b) In accordance with 10 U.S.C. 2692, the Contractor is prohibited from storing, treating, or disposing of toxic or hazardous materials not owned by DoD on a DoD installation, except to the extent authorized by a statutory exception to 10 U.S.C. 2692 or as authorized by the Secretary of Defense. A charge may be assessed for any storage or disposal authorized under any of the exceptions to 10 U.S.C. 2692. If a charge is to be assessed, then such assessment shall be identified elsewhere in the contract with payment to the Government on a reimbursable cost basis.

(c) The Contractor shall include the substance of this clause, including this paragraph (c), in all subcontracts that require, may require, or permit a subcontractor access to a DoD installation, at any subcontract tier.

(End of clause)

Alternate I. As prescribed in 223.7106(b), use the following clause, which revises and redesignates paragraph (c) of the basic clause as paragraph (d), adds a new paragraph (c), and revises paragraph (d).

PROHIBITION ON STORAGE, TREATMENT, AND DISPOSAL OF TOXIC OR

HAZARDOUS MATERIALS-ALTERNATE I (DATE)

(a) Definitions. As used in this clause—

Storage means a non-transitory, semi-permanent or permanent holding, placement, or leaving of material. It does not include a temporary accumulation of a limited quantity of a material used in or a waste generated or resulting from authorized activities, such as servicing, maintenance, or repair of Department of Defense (DoD) items, equipment, or facilities.

Toxic or hazardous materials means:

(i) Materials referred to in section 101(14) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980 (42 U.S.C. 9601(14)) and materials designated under section 102 of CERCLA (42 U.S.C. 9602) (40 CFR Part 302);

(ii) Materials that are of an explosive, flammable, or pyrotechnic nature; or

(iii) Materials otherwise identified by the Secretary of Defense as specified in DoD regulations.

(b) In accordance with 10 U.S.C. 2692, the Contractor is prohibited from storing, treating, or disposing of toxic or hazardous materials not owned by DoD on a DoD installation, except to the extent authorized by a statutory exception to 10 U.S.C. 2692 or as authorized by the Secretary of Defense. A charge may be assessed for any storage or disposal authorized under any of the exceptions to 10 U.S.C. 2692. If a charge is to be assessed, then such assessment shall be identified elsewhere in the contract with payment to the Government on a reimbursable cost basis.

(c) With respect to treatment or disposal authorized pursuant to DFARS 223.7104(10) (10 U.S.C. 2692(b)(10)), and notwithstanding any other provision of the contract, the Contractor assumes all financial and environmental responsibility and liability resulting from any treatment or disposal of toxic or hazardous materials not owned by DoD on a military installation. The Contractor shall indemnify, defend, and hold the Government harmless for all costs, liability, or penalties resulting from the Contractor's treatment or disposal of toxic or hazardous materials not owned by DoD on a military installation.

(d) The Contractor shall include the substance of this clause, including this paragraph (d), in all subcontracts that require, may require, or permits a subcontractor access to a DoD installation, at any tier. Inclusion of the substance of this clause in subcontracts does not relieve the prime Contractor of liability to the Government under paragraph (c).

(End of clause)

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